

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, et al.

vs.

C.A. No. 04-312L

JEFFREY DERDERIAN, et al.

ESTATE OF JUDE B. HENAULT, et al.

vs.

C.A. No. 03-483L

AMERICAN FOAM CORPORATION, et al.

**DEFENDANT CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON'S MOTION TO DISMISS
FIRST AMENDED MASTER COMPLAINT**

NOW COMES defendant CERTAIN UNDERWRITERS AT LLOYD'S, LONDON
before this Honorable Court and moves to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the First
Amended Master Complaint for the reasons set forth in the attached Memorandum of Law.

Respectfully submitted,

CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON

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CERTIFICATION

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CERTAIN
UNDERWRITERS AT LLOYD'S, LONDON'S MOTION TO DISMISS
FIRST AMENDED MASTER COMPLAINT**

Defendant CERTAIN UNDERWRITERS AT LLOYD'S, LONDON ("LLOYD'S")
submits this memorandum in support of its Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

FACTS/TRAVEL

With their First Amended Master Complaint, the plaintiffs allege that LLOYD's, through agents, conducted negligent inspections of The Station. The plaintiffs refer specifically to inspections occurring "May-June 2000." See First Am. Master Complaint, ¶ 671. In their complaint, the plaintiffs refer to three (3) policies of insurance issued by LLOYD'S. Specifically, ¶ 667 alleges that LLOYD'S issued a policy of insurance to Michael Derderian, numbered 05409, with effective dates of March 24, 2000 to March 24, 2001 for property commonly referred to as "The Station." Paragraph 668 alleges that LLOYD'S issued a renewal policy to Mr. Derderian for The Station (Policy No. 08201) with effective dates of March 24, 2001 to March 24, 2002. It is also alleged, in ¶ 669, that LLOYD'S issued a policy to a prior

owner of The Station, Howard Julian d/b/a The Station, Policy No. NOLJD/SPO164, with effective dates of August 14, 1999 to August 14, 2000. That policy was canceled March 9, 2000 when Mr. Julian sold the property.

The plaintiffs allege generally that LLOYD'S, through agents, conducted negligent inspections, that Derderian and Julian relied on the inspections, and that said negligence was a proximate cause of the plaintiffs' injuries and deaths.¹

Each of the three (3) policies at issue were package policies providing both casualty and property, as well as liability coverage.

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6) a court must dismiss a complaint for failure to state a claim where, accepting as true all well-pleaded allegations in the complaint, and giving plaintiffs the benefit of all reasonable inferences that may be gleaned from the complaint, the allegations do not give rise to a valid cause of action against the defendant. Ducalay v. Rhode Island Dept. of Corrections, 160 F.Supp.2d 220 (D.R.I. 2001).

ARGUMENT

The First Amended Master Complaint fails to state a claim against LLOYD'S. First, LLOYD'S owes no duty of care to the plaintiffs under the circumstances presented. Second, LLOYD'S is immune from liability by virtue of R.I. Gen. Laws § 27-8-15. Finally, the allowance of such a claim against LLOYD'S under the circumstances would violate public policy.

¹ As noted, the plaintiffs allege in ¶ 671 that the inspection(s) in question occurred in "May-June, 2000." Documents will establish that an inspection was performed on LLOYD'S behalf on or about April 27, 2000. As the plaintiffs state in their objection to the co-defendant ESSEX'S motion to dismiss the original Master Complaint, the polyurethane foam which is the focal point of the plaintiffs' complaint was installed on the interior walls of The Station in June of 2000. See Essex's Memorandum at p. 2.

I. LLOYD'S Owes No Common Law Duty to Plaintiffs.

Under Rhode Island law, it has long been held that an insurer owes no independent duty of care to third-party claimants as a result of its contractual relationship with policyholders. See Auclair v. Nationwide Mut. Ins. Co., 505 A.2d 431 (R.I. 1986). The Rhode Island Supreme Court has never recognized a direct negligence action against an insurer on such a basis. See, e.g., Canavan v. Lovett, Scheffrin and Harnett, 745 A.2d 173, 174-75 (R.I. 2000) (affirming trial court's dismissal of complaint against LLOYD'S based on plaintiff's failure to plead circumstances that would permit him to bring a direct action against insurer); Cianci v. Nationwide Ins. Co., 659 A.2d 662, 667 (R.I. 1995) (injured party had no standing to sue insurer for bad faith where said party was not the insured and not a party to the contract of insurance). There simply is no case law in Rhode Island that recognizes a cause of action against an insurer for an alleged negligent inspection of the insured's premises. For example, in McAleer v. Smith, 791 F.Supp. 923 (D.R.I. 1992), this Court considered a claim involving negligent inspection against LLOYD'S. In McAleer, plaintiffs alleged a negligent inspection of a vessel by an insurance underwriter, allegedly acting as an agent of LLOYD'S. This Court held that the alleged failure to properly inspect the vessel did not amount to a breach of duty that ran to the plaintiffs from the decedents and thus LLOYD'S could not be held liable, even if it was found responsible for the inspection conducted by a third party. McAleer, 791 F.Supp. at 934-35. See also Mustapha v. Liberty Ins. Co., 268 F.Supp. 890, 895 (D.R.I. 1967) (no claim against workers' compensation insurer for alleged negligent safety inspections).

The plaintiffs' attempt to avoid the overwhelming precedent from both Rhode Island and other jurisdictions (see Essex Insurance Company Memorandum at pp. 5-8; Reply Memorandum at pp. 3-8; and Brief of Amicus Curiae of Property and Casualty Insurance Association of America at pp. 13-15) by invoking Restatement (Second) of Torts § 324A is misplaced. First, § 324A has not

been adopted by the Rhode Island Supreme Court. Second, even if recognized, the provision is inapplicable. Insurance inspections of the type referenced in the plaintiffs' First Amended Master Complaint cannot be considered an "undertaking" for the purpose of benefiting a third party as a matter of law. See Smith II v. Allendale Mut. Ins. Co., 303 N.W.2d 702, 705-06 (Mich. 1981) ("absent evidence that the insurer agreed or intended to provide services for the benefit of the insured, there is no basis for the conclusion that such inspections are conducted other than to serve the insurers' interests in underwriting, rating and loss prevention and hence there is no undertaking"); Patton v. Simone, Civ. Action Nos. 90C-JA-29, 90C-JL-219, 1993 WL 54462 at 9 (Del. Super. Ct. Jan 28 1993) (to impose liability under § 324A, plaintiff must show that the defendant insurer "intended to render [its] services to benefit another, not merely [as] inspection and loss prevention suggestions"). Third, and most importantly, the application of § 324A as proffered by the plaintiffs here would be in direct contradiction to R.I. Gen. Laws § 27-8-15, providing immunity to LLOYD'S for the inspections under the circumstances.

II. R.I. Gen. Laws § 27-8-15 Provides LLOYD'S Immunity from Liability for the Plaintiffs' Alleged Cause of Action Against LLOYD'S.

R.I. Gen. Laws § 27-8-15 (hereinafter, the "Inspection Statute") provides immunity to property, casualty or boiler machinery insurers in connection with insurance inspections. The plaintiffs themselves concede that the Inspection Statute provides immunity to such insurers in connection with inspections. See Memorandum of Law in Support of Plaintiffs' Objection to Motion to Dismiss Master Complaint Against Essex Insurance Company, pp. 4-6. Unlike Essex Insurance Company, LLOYD'S provided property and casualty, as well as liability, coverage under the three (3) policies of insurance at issue. Thus, by the plaintiffs' own admission LLOYD'S is immune under the express terms of the Inspection Statute.

The outcome cannot change because the LLOYD'S policies at issue also included commercial general liability ("CGL") coverage. The plaintiffs cannot credibly argue now that

the immunity provided by the Inspection Statute applies to a property and casualty insurer, but if that insurer also includes CGL coverage the immunity is rendered obsolete. In any event, CGL coverage is "casualty insurance" as defined in the Inspection Statute. See Brief of Amicus Curiae, Property and Casualty Insurance Association of America, submitted in support of defendant ESSEX INSURANCE COMPANY'S Motion to Dismiss, at pp. 2-6.

III. Plaintiffs' Claim for "Negligent Inspections" is Inconsistent with Public Policy.

As shown above, Rhode Island has previously determined that as a matter of public policy an inspection conducted in connection with the issuance of an insurance policy should not subject an insurance company to liability. For the many reasons cited by the Property and Casualty Insurance Association of America in its Amicus Curiae Brief (see pp. 13-23), public policy dictates that this Court not expand Rhode Island law to recognize such a tort.

CONCLUSION

WHEREFORE, or the foregoing reasons, defendant CERTAIN UNDERWRITERS AT LLOYD'S, LONDON respectfully requests that its motion to dismiss now be granted.

Respectfully submitted,

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